UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARIO BAUTISTA DURAN, individually and in behalf of all other persons similarly situated,

Plaintiff,

REPORT AND RECOMMENDATION
15 CV 7243 (AMD)(LB)

-against-

SUPERIOR COOLING LLC and MENDY ISRAEL, jointly and severally,

Defendants.

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BLOOM, United States Magistrate Judge:

Plaintiff, Mario Bautista Duran, individually and on behalf of all other persons similarly situated, brings this civil action against defendants Superior Cooling, LLC ("Superior Cooling") and Mendy Israel ("Israel") alleging defendants violated his rights under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et. seq.* ("FLSA") and the New York Labor Law, Art. 6, §§ 190-99, and Art. 19, §§ 650-65 (collectively "NYLL"). Despite proper service of the summons and complaint, defendants have failed to plead or otherwise defend this action. Plaintiff now moves for a default judgment pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure. The Honorable Ann M. Donnelly referred plaintiff's motion for a default judgment to me for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). For the reasons set forth below, it is respectfully recommended that plaintiff's motion for a default judgment should be granted, and that a default judgment should be entered against defendants in the total amount of $32,337.69.

BACKGROUND[1]

Superior Cooling is an HVAC service and installation company located in Brooklyn, New York. Plaintiff's Complaint ("Complaint"), ¶ 12. Plaintiff alleges that defendants employed him as a mechanic and installer from "approximately [ ] 2005 until October 9, 2015." Id. ¶¶ 17-18. Plaintiff alleges that defendant Israel was an owner of Superior Cooling, and that he actively participated in the business, exercised substantial control over the functions of the employees, and acted in the interest of an employer. Id. ¶¶ 13-14. Furthermore, plaintiff alleges that defendant Israel had the capacity, on behalf of Superior Cooling, to establish the wages and hours of Superior Cooling's employees. Id. ¶ 15.

While employed at Superior Cooling, plaintiff alleges that he worked eight and one-half hours per workday. Id. ¶ 19. From 2005 to July 2015, Duran worked approximately five days per week three weeks per month, and approximately seven days per week once a month. Id. From July 2015 to October 9, 2015, Duran worked approximately seven days per week every week. Id. Defendants paid plaintiff approximately $80 per day in cash until 2015, and approximately $90 per day thereafter. Id. ¶¶ 20, 22. Plaintiff alleges that he worked in excess of forty hours each week, yet defendants willfully failed to pay him one and one-half times the regular rate of pay as overtime compensation. Id. ¶ 23. Furthermore, during his employment, plaintiff was required to wear a uniform: a shirt with a logo. Id. ¶ 21. Plaintiff alleges that the defendants did not launder or maintain his required uniform, that plaintiff laundered and maintained the uniform at his own expense, and that defendants willfully failed to pay him an allowance for uniform maintenance.[2]

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[1] The facts described herein are drawn from the uncontested allegations contained in plaintiff's complaint, and are taken as true for the purposes of deciding this motion. See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F. 3d 105, 108 (2d Cir. 1997) (deeming well-pleaded allegations in complaint admitted on motion for a default judgment).

[2] Although plaintiff alleges violations regarding defendants' uniform maintenance practices, he asserts no claim for damages. See generally Plaintiff's Memorandum of Law In Support of Plaintiff's Motion for Default Judgment ("Memorandum"), ECF No. 19.

Id. ¶ 24. Plaintiff further alleges that defendants failed to provide him with a wage notice and acknowledgement, and failed to maintain accurate and sufficient records. Id. ¶¶ 25-26.

PROCEDURAL HISTORY

On December 19, 2015, plaintiff commenced this action on behalf of himself and all other similarly situated persons alleging that defendants Superior Cooling and Israel violated the FLSA and the NYLL. See Complaint.

On February 16, 2016, Superior Cooling was served with the summons and complaint. See Affidavit of Service for Superior Cooling, ECF No. 7. On June 13, 2016, Israel was served with the summons and complaint. See Affidavit of Service for Mendy Israel, ECF No. 9. Defendants failed to respond to the complaint. On September 28, 2016, the Clerk of the Court entered a notation of each defendant's default pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. See Entries of Default, ECF Nos. 14 & 15. On December 2, 2016, plaintiff moved for a default judgment pursuant to Rule 55(b)(2) and attached an affidavit in support of his motion. See Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Default Judgment ("Memorandum"), ECF No. 19; Affidavit of Plaintiff in Support of Motion for Default Judgment ("Affidavit"), ECF No. 18. On March 8, 2017, plaintiff's counsel submitted an affirmation in support of their motion for attorney's fees and costs. See Affirmation in Support of Motion for Attorney's Fees and Costs ("Affirmation"), ECF No. 24.

DISCUSSION

I. Legal Standard

Rule 55 of the Federal Rules of Civil Procedure establishes the two-step process for a plaintiff to obtain a default judgment. First, "[w]hen a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Second, after a default has been entered against a defendant, and the defendant fails to appear or move to set aside the default under Rule 55(c), the Court may, on a plaintiff's motion, enter a default judgment. Id. 55(b)(2). In light of the Second Circuit's "oft-stated preference for resolving disputes on the merits," default judgments are "generally disfavored." Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 95–96 (2d Cir. 1993). "Accordingly, plaintiff is not entitled to a default judgment as a matter of right simply because a party is in default." Finkel v. Universal Elec. Corp., 970 F. Supp. 2d 108, 118 (E.D.N.Y. 2013) (citing Erwin DeMarino Trucking Co. v. Jackson, 838 F. Supp. 160, 162 (S.D.N.Y. 1993) (noting that courts must "supervise default judgments with extreme care to avoid miscarriages of justice")).

On a motion for default judgment, the Court "deems all the well-pleaded allegations in the pleadings to be admitted." Transatlantic Marine Claims Agency, Inc., 109 F.3d at 108. In determining whether to issue a default judgment, the Court has the "responsibility to ensure that the factual allegations, accepted as true, provide a proper basis for liability and relief." Rolls-Royce plc v. Rolls-Royce USA, Inc., 688 F. Supp. 2d 150, 153 (E.D.N.Y. 2010) (citing Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981)). In other words, "'[a]fter default . . . it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law.'" Id. (citation omitted). In evaluating "whether the unchallenged facts constitute a legitimate cause of action," the Court is limited to the four corners of the complaint. Id. (citation omitted). It is not so restricted in determining damages, which the Court may calculate based on documentary evidence, affidavits, or evidence gleaned from conducting a hearing on damages. See Transatlantic Marine Claims Agency, Inc., 109 F.3d at 111.

II. Liability

The factual allegations in plaintiff's complaint establish defendants' liability under the FLSA. The FLSA provides that:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). "To succeed on a FLSA overtime claim, plaintiff must show that: (1) he was an employee who was eligible for overtime (not exempt from the Act's overtime pay requirements); and (2) that he actually worked overtime hours for which he was not compensated." Hosking v. New World Mortg., Inc., 602 F. Supp. 2d 441, 447 (E.D.N.Y. 2009) (citation omitted). The FLSA contains several exemptions from its overtime requirement, but "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." Corning Glass Works v. Brennan, 417 U.S. 188, 196–97 (1974).

In addition to the FLSA claim, plaintiff also seeks relief under the NYLL. With regard to these state overtime wage claims, "the relevant portions of [the NYLL] do not diverge from the requirements of the FLSA," and thus the analysis may be performed in tandem. Hosking, 602 F. Supp. 2d at 447 (internal quotation marks, alteration, and citation omitted); see also 12 N.Y.C.R.R. § 142-2.2 ("An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate . . . .").

Plaintiff alleges that Superior Cooling, at all relevant times, had gross annual revenues in excess of $500,000. Complaint, ¶ 17. Plaintiff further asserts that defendant employed plaintiff within the meaning of the FLSA and the NYLL. See 29 U.S.C. § 203(s)(1)(A)(ii) (requiring gross revenues exceeding $500,000); N.Y. Labor Law § 651(5) (defining "employee"). Plaintiff alleges that he worked in excess of forty hours each work week, and that defendants willfully failed to pay him overtime compensation of one and one-half times his regular rate of pay. Complaint, ¶ 23. These allegations, accepted as true, establish Superior Cooling's liability under the FLSA and the NYLL for failure to pay plaintiff overtime wages. See 29 U.S.C. § 207(a)(1); 12 N.Y.C.R.R. §§ 142-2.2, 142-2.4.

Plaintiff's complaint likewise establishes defendant Israel's liability. Plaintiff alleges that Israel "was an individual who actively participated in the business of the defendants, exercised substantial control over the functions of the employees of the defendants, including the plaintiff and party plaintiffs, and acted directly or indirectly in the interest of an employer," and "had the capacity on behalf of the defendants to establish the wages and hours of the employees of the defendants." Complaint, ¶¶ 14-15. These factual allegations, accepted as true, establish Israel's liability under both the FLSA and the NYLL. See Irizarry v. Catsimatidis, 722 F.3d 99, 110–11 (2d Cir. 2013) (requiring that an individual exercise "operational control" to impose individual liability under the FLSA).

Accordingly, it is respectfully recommended that plaintiff's motion for a default judgment should be granted.

III. Damages

It is well established that when a party is in default, it is "deemed to constitute a concession of all well[-]pleaded allegations of liability," but it is "not considered an admission of damages." Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors, Inc., 699 F.3d 230, 234 (2d Cir. 2012) (citation omitted); see also Credit Lyonnais Secs. (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999) ("Even when a default judgment is warranted based on a party's failure to defend, the allegations in the complaint, with respect to the amount of the damages are not deemed true."). On a motion for a default judgment, a plaintiff has the burden to prove damages to the Court with a "reasonable certainty." Credit Lyonnais Secs. (USA), Inc., 183 F.3d at 155 (citing Transatlantic Marine Claims Agency, Inc., 109 F.3d at 111). The Court, however, does not need to hold a hearing, as "[d]etailed affidavits and other documentary evidence can suffice in lieu of an evidentiary hearing." Chanel, Inc. v. Jean-Louis, No. 06 CV 5924 (ARR)(JO), 2009 WL 4639674, at *4 (E.D.N.Y. Dec. 7, 2009) (citing Action S.A. v. Marc Rich & Co., Inc., 951 F.2d 504, 508 (2d Cir. 1991)).

"Under the FLSA, an employee seeking to recover unpaid minimum wages or overtime 'has the burden of proving that he performed work for which he was not properly compensated.'" Jiao v. Chen, No. 03 Civ. 0165 (DF), 2007 WL 4944767, at *2 (S.D.N.Y. Mar. 30, 2007) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)). "When an employer fails to comply with the FLSA's record-keeping requirements, however, . . . [t]he plaintiff is able to meet his initial burden under the statute by relying on his recollection alone." Id. at **8–9 (citations omitted); see also Rodriguez v. Queens Convenience Deli Corp., No. 09 CV 1089 (KAM)(SMG), 2011 WL 4962397, at *2 (E.D.N.Y. Oct. 18, 2011) ("[A] plaintiff may meet his or her burden of establishing how many hours he or she worked by relying solely on his or her recollection." (internal quotation and citation omitted)). Plaintiff's sworn declaration provides a sufficient basis for the Court to determine damages. Maldonado v. La Nueva Rampa, Inc., No. 10 Civ. 8195 (LLS)(JLC), 2012 WL 1669341, at *3 (S.D.N.Y. May 14, 2012) ("An affidavit that sets forth the number of hours worked is sufficient.").

A. Unpaid Overtime Wages Under the FLSA and the NYLL

Plaintiff seeks recovery of unpaid overtime wages for work performed between December 19, 2009 and October 9, 2015. A plaintiff may recover unpaid compensation under the FLSA and the NYLL, but when the statutory periods of the FLSA and the NYLL overlap, plaintiff cannot recover "for those unpaid wages under both statutes, because doing so would provide a double recovery." Janus v. Regalis Const., Inc., No. 11 CV 5788 (ARR)(VVP), 2012 WL 3878113, at *7 (E.D.N.Y. July 23, 2012); see also Maldonado, 2012 WL 1669341, at *5 (explaining that a plaintiff may not simultaneously recover under both statutes for the same injury). FLSA claims are limited to unpaid wages that accrued within the two years prior to the commencement of the lawsuit, or three years for willful violations. See 29 U.S.C. § 255(a). Here, plaintiff alleges that Superior Cooling willfully violated the FLSA. Complaint, ¶ 33. Accordingly, the Court applies the three-year limitations period to plaintiff's FLSA claim. See Vinas v. Pullini Subsurface Contractors, Inc., No. 11 CV 2765 (FB)(LB), 2012 WL 6641662, at *4 (E.D.N.Y. Oct. 5, 2012) adopted by 2012 WL 6633929 (E.D.N.Y. Dec. 20, 2012) ("The court deems [willfulness] admitted given defendant's default."). The statute of limitations for a violation of the NYLL is six years. See N.Y. Lab. Law § 663(3). Accordingly, plaintiff is entitled to unpaid overtime wages under the NYLL for work performed between December 19, 2009 and December 18, 2012, and to unpaid overtime wages under the FLSA for work performed between December 19, 2012 and October 9, 2015. [3]

Plaintiff may recover unpaid wages for 6.75 hours of overtime per week under the NYLL for work performed between December 19, 2009 and December 18, 2012. Plaintiff was paid $80

[3] Plaintiff commenced this action on December 19, 2015; accordingly, he can recover wages from December 19, 2009 under the NYLL six-year statute of limitations.

per day, or $9.41 per hour.[4] As such, plaintiff is entitled to an additional $4.71 for each overtime hour worked.[5] Plaintiff is thus entitled to $31.79 per week in overtime wages under the NYLL for this 157-week period, [6] which totals $4,991.03.

Plaintiff may also recover unpaid wages for 6.75 hours of overtime per week under the FLSA for work performed between December 19, 2012 and June 30, 2015. From December 19, 2012 to December 31, 2014, plaintiff was paid $80 per day, or $9.41 per hour. Thus, plaintiff is entitled to $31.79 per week in overtime wages for that 106-week period, which totals $3,369.74. From January 1, 2015 to June 30, 2015, plaintiff was paid $90 per day, or $10.59 per hour.[7] As such, plaintiff is entitled to $35.78 per week in overtime wages for that 26-week period, which totals $930.28. From July 1, 2015 to October 9, 2015, plaintiff is entitled to 19.50 hours of overtime wages each week. As plaintiff was paid $90 per day, he is entitled to $103.30 per week in overtime wages for that 14-week period, which totals $1,446.20. In sum, plaintiff should be awarded $5,746.22 in unpaid overtime wages under the FLSA.

Accordingly, it is respectfully recommended that plaintiff be awarded $10,737.25 in total unpaid overtime wages under the FLSA and the NYLL.

B. Liquidated Damages

Plaintiff also seeks an award of liquidated damages for the entire period of his employment under both the FLSA and the NYLL. Complaint ¶ 56. Under the FLSA, an employer is liable, after violating overtime compensation law, for "an additional equal amount as liquated damages." 29 U.S.C. § 216(b). As the Court has deemed defendant's failure to pay plaintiff overtime compensation willful and the three year statute of limitations for the FLSA violation applies, defendants are liable for liquidated damages for plaintiff's unpaid overtime wages arising after December 19, 2012. The employer bears the burden of establishing that "the act or omission giving rise to such action was in good faith" and that liquidated damages should not be awarded. 29 U.S.C. § 260. Here, as defendants failed to respond, plaintiff is entitled to an award of liquidated damages.

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[4] Since plaintiff was compensated on a daily basis, the regular hourly rate is determined by "totaling all the sums received at such day rates or job rates in the workweek and dividing by the total hours actually worked. He is then entitled to an extra half-time pay at this rate for all hours worked in excess of 40 in the work week." 29 C.F.R. § 778.112. Here, plaintiff worked 8.5 hours per day. At $80 per day, plaintiff's hourly rate equals 9.41 per hour ($80 divided by 8.5).

[5] At time and a half, plaintiff should have been paid $14.12 for each overtime hour worked.

[6] Plaintiff's calculations for damages round his work-weeks to the nearest whole week. The Court agrees with this approach.

[7] At time and a half, plaintiff should have been paid $15.89 for each overtime hour worked.

"Since the New York Labor Law allows claims arising within six years as opposed to FLSA's three years, [under the NYLL plaintiff] is entitled to twenty-five percent of unpaid overtime wages in liquidated damages for the time period not covered under the FLSA, provided the court finds that defendants acted 'willfully' in violating the statute." Santillan v. Henao, 822 F. Supp. 2d 284, 297 (E.D.N.Y. 2011); see also N.Y. Lab. Law §§ 198(1-a), (3). The New York Labor Law was amended effective April 9, 2011, raising the recoverable amount of liquidated damages for unpaid wages to 100 percent. N.Y. Lab. Law § 663(1) ("Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of underpayments found to be due the employee."). "Thus, plaintiff[] [is] entitled to one hundred percent liquidated damages under state law for time worked after April 9, 2011, and to twenty-five percent liquidated damages under state law for time worked before April 9, 2011." Berrezueta v. Royal Crown Pastry Shop, Inc., No. 12 CV 4380 (FB)(RML), 2013 WL 6579799, at *5 (E.D.N.Y. Dec. 16, 2013).

"Courts in the Second Circuit were split, until recently, as to whether plaintiffs could recover liquidated damages under the FLSA and the NYLL for the same violations." Leon v. Zita Chen, No. 16 CV 480 (KAM)(PK), 2017 WL 1184149, at *9 (E.D.N.Y. Mar. 29, 2017).

However, in a Summary Order issued on December 7, 2016, the Second Circuit found no right to double recovery of liquidated damages under both the NYLL and the FLSA. Bedasie v. Mr. Z Towing, Inc., No. 13 CV 5453 (CLP), 2017 WL 1135727, at *47 (E.D.N.Y. Mar. 24, 2017) (citing Chowdhury v. Hamza Express Food Corp., No. 15 CV 3142, 2016 WL 7131854, at *61 (2d Cir. Dec. 7, 2016)) ("Today the NYLL and FLSA liquidated damages provisions are identical in all material respects, serve the same functions, and redress the same injuries. In the absence of any indication otherwise, we interpret the New York statute's provision for liquidated damages as satisfied by a similar award of liquidated damages under the federal statute."); see also Leon, 2017 WL 1184149, at *9 n.2 (finding Chowdhury's "reasoning and holdings persuasive" notwithstanding the fact that it "is a non-precedential panel opinion").

Accordingly, plaintiff should not recover liquidated damages under both the FLSA and the NYLL, but instead, should recover under whichever statute provides for a greater recovery. Chuchuca v. Creative Customs Cabinets Inc., No. 13 CV 2506 (RLM), 2014 WL 6674583, at *16 (E.D.N.Y. Nov. 25, 2014) (awarding the greater of either the FLSA or the NYLL liquidated damages where both forms of damages were otherwise available for the same violation). As such, it is respectfully recommended that plaintiff should be awarded $5,746.22 in liquidated damages under the FLSA, and $3,369.74[8] under the NYLL.

C. Statutory Damages

An employer is required to furnish an employee with a wage statement under the NYLL. See N.Y. Lab. Law. § 195(3). If an employer fails to provide the employee with a wage

[8] Between December 19, 2009 and April 8, 2011, plaintiff worked 68 weeks. Plaintiff is therefore entitled to $2,161.72 in overtime wages under the NYLL. For this time period, plaintiff is entitled to twenty-five percent liquidated damages, which equals $540.43. Between April 9, 2011 and December 18, 2012, plaintiff worked 89 weeks. Plaintiff is therefore entitled to $2,829.31 in overtime wages under the NYLL. For this time period, plaintiff is entitled to one hundred percent liquidated damages, which equals $2,829.31. Accordingly, plaintiff should be awarded $3,369.74 in liquidated damages under the NYLL.

statement, the employee is entitled to damages of $100 per work week that the violation occurred, up to a maximum of $2,500 until February 26, 2015 when the statute was amended. After February 26, 2015, an employee is entitled to $250 per work day that the violation occurred, up to a maximum of $5,000. See N.Y. Lab. Law § 198(1-d) (amended 2015). Here, plaintiff alleges that defendants failed to provide him with any wage statements throughout his employment. Therefore, plaintiff should be awarded the maximum statutory damages in the amount of $5,000.

D. Prejudgment Interest

Plaintiff also requests prejudgment interest. Complaint, ¶ 56. It is well established that a plaintiff may not recover both liquidated damages under the FLSA and prejudgment interest for the same employment period, because both awards serve the same compensatory purpose. Yu G. Ke v. Saigon Grill, 595 F. Supp. 2d 240, 261–62 (S.D.N.Y. 2008). In contrast, the provisions for liquidated damages and prejudgment interest under New York law "serve fundamentally different purposes." Reilly v. NatWest Mkts. Grp. Inc., 181 F.3d 253, 265 (2d Cir. 1999). Plaintiff may, therefore, recover prejudgment interest for damages recovered solely under New York law, i.e., the period for which plaintiff is not entitled to liquidated damages under the FLSA. See id.; Yu Y. Ho v. Sim Enters., Inc., No. 11 Civ. 2855 (PKC), 2014 WL 1998237, at **19–20 (S.D.N.Y. May 14, 2014). The statutory interest rate in New York is applied to a plaintiff's unpaid overtime wage claims. Baltierra v. Advantage Pest Control Co., No. 14 Civ. 5917 (AJP), 2015 WL 5474093, at *12 (S.D.N.Y. Sept. 18, 2015). As discussed above, under the NYLL plaintiff should be awarded $4,991.03 for unpaid overtime compensation. Plaintiff is therefore entitled to prejudgment interest on this amount.

Interest is set according to New York law at nine percent per annum. N.Y. C.P.L.R. § 5004; see also Santillan, 822 F. Supp. 2d at 299 (awarding nine percent prejudgment interest for three years under NYLL); Berrezueta, 2013 WL 6579799, at *6 (same). Courts have broad discretion to establish the first day on which prejudgment interest shall accrue. Santillan, 822 F. Supp. 2d at 298 (citing Conway v. Icahn & Co., 16 F.3d 504, 512 (2d Cir. 1994)). Interest may be calculated from "the date [damages were] incurred or upon all of the damages from a single reasonable intermediate date." N.Y. C.P.L.R. § 5001(b). A reasonable intermediate date here is the midpoint between the compensable period, December 19, 2009 to December 18, 2012, or June 20, 2011. Accordingly, it is recommended that prejudgment interest should be awarded to plaintiff from June 20, 2011 until judgment is entered.

Interest is determined by multiplying the state law damages by the interest rate (.09) and the number of years that elapsed between the intermediate date and the date the judgment is rendered. See Yu Y. Ho, 2014 WL 1998237, at **19–20 (explaining prejudgment interest calculation). The amount of overtime wages due to plaintiff under the NYLL is $4,991.03. The calculated pre-judgment interest at a rate of 9% per day on this amount is $2,646.96.[9] Daily interest shall continue to accrue at the rate of $1.23 per day for each day until judgment is entered.

E. Attorney's Fees and Costs

1. Attorney's Fees

The FLSA and the NYLL both allow for an award of "reasonable" attorney's fees. See 29 U.S.C. §216(b); N.Y. Lab. Law § 663(1). "Requests for attorney's fees in this Circuit must be accompanied by contemporaneous time records that show for each attorney, the date, the hours

[9] This sum was calculated by taking the number of days between the midpoint selected, June 20, 2011, and the date of this Report and Recommendation, and multiplying the sum by the daily interest of $1.23 ($4,991.03 [wages owed under NYLL] x 0.09 [yearly interest rate] = $449.19 [yearly interest] / 365 days = $1.23 per day interest).

expended, and the nature of the work done." Juarez v. Precision Apparel, Inc., No. 12 CV 2349 (ARR)(VMS), 2013 WL 5210142, at *13 (E.D.N.Y. Aug. 21, 2013) (adopting Report and Recommendation) (internal quotation and citation omitted).

In the Second Circuit, the amount of attorney's fees awarded to a prevailing party is determined by calculating the "presumptively reasonable fee." Simmons v. N.Y. City Transit Auth., 575 F.3d 170, 172 (2d Cir. 2009). To determine this fee, the Court begins by multiplying the number of hours spent on the litigation by "a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). A reasonable rate is "the rate a paying client would be willing to pay," based on the "prevailing [hourly rate] in the community . . . . where the district court sits." Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 190 (2d Cir. 2007); see also Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984) ("[T]he requested rates [must be] in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."). In determining the reasonable hourly rate, the Court considers the following factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the attorneys' customary hourly rate; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the circumstances; (8) the amount involved in the case and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Arbor Hill, 522 F.3d at 186 n.3. "The burden is on the party moving for attorneys' fees to justify the hourly rate sought." Ehrlich v. Royal Oak Fin. Servs., Inc., No. 12 CV 3551 (BMC), 2012 WL 5438942, at *3 (E.D.N.Y. Nov. 5, 2012) (citing Hensley, 461 U.S. at 437). "Courts have broad discretion to assess the reasonableness of each component of a fee award." Jaramillo v. Banana King Rest. Corp., No. 12 CV 5649 (NGG)(RML), 2014 WL 2993450, at *8 (E.D.N.Y. June 4, 2014) (adopting Report and Recommendation) (citation omitted).

Plaintiff's counsels' Affirmation in Support of Motion for Attorney's Fees and Costs requests $4,855.00 in attorney's fees and $732.52 in costs. See Affirmation. Plaintiff is represented in this action by the Law Office of Justin A. Zeller, P.C., a law firm specializing in wage and hour litigation since 2005. Brandon D. Sherr ("Mr. Sherr") and John M. Gurrieri ("Mr. Gurrieri") have both worked on behalf of the plaintiff in this action. Mr. Sherr graduated law school in 2010, while Mr. Gurrieri graduated law school in 2013. Mr. Sherr bills at $350 per hour, while Mr. Gurrieri bills at $300 per hour.

Courts have found that the prevailing hourly rate for law firm partners in the Eastern District of New York is between $300 and $450. Hugee v. Kimso Apartments, LLC, 852 F. Supp. 2d 281, 289-99 (E.D.N.Y. 2012). Recent opinions in FLSA cases issued within this district have found hourly rates to be approximately $200 to $325 for senior associates and $100 to $200 for junior associates. Sass v. MTA Bus Co., 6 F. Supp. 3d 238, 261 (E.D.N.Y. 2014) (quoting Akman v. Pep Boys Manny Moe & Jack of Delaware, Inc., No. 11 CV 3252 (MKB), 2013 WL 4039370, at *2 (E.D.N.Y. Aug. 7, 2013)). The Court finds the billing rates for Mr. Sherr and Mr. Gurrieri high "for a routine wage and hour case within this district." Gonzalez v. Jane Roe Inc., No. 10 CV 1000 (NGG)(RML), 2015 WL 4662490, at *6 (E.D.N.Y. July 15, 2015) adopted as modified, 2015 WL 4681151 (E.D.N.Y. Aug. 6, 2015).[10] I therefore respectfully recommend reducing Mr. Sherr's hourly rate to $300 and Ms. Gurrieri's hourly rate to $250.

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[10] Plaintiff's counsel, in support of their rates, rely solely on cases from the Southern District of New York. Of note, in Carvente-Avila v. Chaya Mushkah Rest. Corp., No. 12 Civ. 2327, ECF No. 131, slip op. at 6 (S.D.N.Y.), Mr. Sherr's fees were found reasonable at an amount of $300. In Patterson v. Copa NYC LLC, No. 15 Civ. 2327, ECF No. 41, slip op. at 15-16 (S.D.N.Y. Dec. 29, 2015), Mr. Gurrieri's fees were found reasonable at $250.

The Court must also determine whether the hours expended by plaintiff's counsel were reasonable. Cuevas v. Ruby Enters. of N.Y., Inc., No. 10 CV 5257 (JS)(WDW), 2013 WL 3057715, at *3 (E.D.N.Y. June 17, 2013). "[T]he Court must use its experience with the case, as well as its experience with the practice of law to assess the reasonableness of the hours spent . . . in a given case." E. Sav. Bank, FSB v. Beach, No. 13 CV 0341 (JS)(AKT) 2014 WL 923151, at *14 (E.D.N.Y. Sept. 10, 2014) (internal quotation marks omitted); see also Firststorm Partners 2, LLC v. Vassel, 10 CV 2356 (KAM)(RER), 2012 WL 3536979, at *5 (E.D.N.Y. Aug. 15, 2012) (the court must determine if the hours "have been reasonably expended"). Mr. Sherr and Mr. Gurrieri submit contemporaneous time records for 15 hours of work. I find the time Mr. Sherr and Mr. Gurrieri expended on this action to be reasonable. See, e.g., Apolinar v. Global Deli & Grocery, Inc., No. 12 CV 3446 (RJD)(VMS), 2013 WL 5408122, at *16 (E.D.N.Y. Sept. 25, 2013) (approving 44.93 hours reasonable in FLSA default action for two plaintiffs). Plaintiff seeks attorney's fees for 7.1 hours of work performed by Mr. Sherr and 7.9 hours of work performed by Mr. Gurrieri. At an hourly rate of $300 for 7.1 hours of work by Mr. Sherr and an hourly rate of $250 for 7.9 hours of work by Mr. Gurrieri, the Court respectfully recommends that plaintiff should be awarded $4,105 in attorney's fees.

2. Costs

A prevailing plaintiff in an FLSA and NYLL action is also entitled to recover costs from defendants. 29 U.S.C. § 216(b). Plaintiff seeks $732.52 in costs, which includes $400.00 for the filing fee to initiate this action and $315 for service of process. Plaintiff's attorneys' request for $23.52 for postage, for court search fees, and envelopes is likewise approved as reasonable. See Affirmation; see also Kalloo v. Unlimited Mechanical Co. of N.Y., Inc., 977 F. Supp. 2d 209, 214 (E.D.N.Y. 2013) ("Plaintiffs' request for….costs is reasonable and sufficiently supported by their contemporaneous records.”); Garcia v. Badyna, No. 13 CV 4021 (RRM)(CLP), 2014 WL 4728287, at *17 (E.D.N.Y. Sept. 23, 2014) (awarding $514.25 in litigation costs for the filing fee and service of process based on counsel’s contemporaneous time records). Therefore, plaintiff should be awarded $732.52 in costs.

F. Award Summary

In sum, plaintiff should be awarded:

CATEGORY	TOTAL AMOUNT
Unpaid Overtime (FLSA)	$5,746.22
Unpaid Overtime (NYLL)	$4,991.03
Statutory Violations (NYLL)	$5,000
Liquidated Damages (FLSA)	$5,746.22
Liquidated Damages (NYLL)	$3,369.74
Prejudgment Interest (NYLL)	$2,646.96
Attorney's Fees	$4,105.00
Costs	$732.52
TOTAL	**$32,337.69**

CONCLUSION

For the reasons set forth above, it is respectfully recommended that plaintiff’s motion for a default judgment should be granted. A default judgment should be entered against defendants in the total amount of $32,337.69 representing $10,737.25 in unpaid overtime wages, $9,115.96 in liquidated damages, $5,000 in statutory damages, $2,646.96 in prejudgment interest, $4,105.00 in attorney’s fees, and $732.52 in costs. The Court should award plaintiff prejudgment interest under the NYLL at a rate of $1.23 per day through the entry of judgment.

Plaintiff is hereby ordered to serve a copy of this Report upon defendants at their last known address and to file proof of service with the Court forthwith.

FILING OF OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen days from service of this Report to file written objections. See also, Fed. R. Civ. P. 6. Such objections shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made within the fourteen-day period. Failure to file a timely objection to this Report generally waives any further judicial review. Marcella v. Capital Dist. Physician's Health Plan, Inc., 293 F.3d 42 (2d Cir. 2002); Small v. Sec'y of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989); see Thomas v. Arn, 474 U.S. 140 (1985).

SO ORDERED.

/S/
LOIS BLOOM
United States Magistrate Judge

Dated: May 10, 2017
Brooklyn, New York